87-1363

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

JOHN J. KELLY, Chief State's Attorney,
LESTER J. FORST, Commissioner of Public Safety,
Petitioners,

v.

BILL WILKINSON,
JAMES FARRANDS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

WHETHER PAT-DOWN SEARCHES FOR WEAPONS CONDUCTED ON ALL PERSONS ENTERING A PUBLIC FORUM ARE REASONABLE UNDER THE FOURTH AMENDMENT WHERE THE SEARCHES (1) ARE AUTHORIZED BY A NEUTRAL AND DETACHED MAGISTRATE; (2) HAVE A PUBLIC SAFETY AND NON-INVESTIGATORY PURPOSE; (3) AFFORD THE SUBJECT AN OPPORTUNITY TO DECLINE TO ENTER THE AREA; (4) ARE SUPPORTED BY EVIDENCE ESTABLISHING A SUBSTANTIAL LIKELIHOOD THAT PERSONS IN ATTENDANCE WILL BE ARMED AND DANGEROUS; AND (5) PROTECT THE EXERCISE OF FIRST AMENDMENT RIGHTS.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

TABLE OF AUTHORITIES (continued)

Miscellaneous: **Page(s)**

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OPINIONS BELOW

The opinion of the district court rendering judgment for the respondents is reported at 639 F.Supp. 518 (D. Conn. 1986), and appears in the appendix at 1a. The memorandum of the district court on the petitioners' post judgment motions for stay and for relief from judgment is reported at 656 F.Supp. 710 (D. Conn. 1986), and appears in the appendix at 30a. The

opinion of the court of appeals is reported at 832 F.2d 1330 (2d Cir. 1987), and appears in the appendix at 37a.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Second Circuit was rendered on November 9, 1987. App. at 37a. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(l), 2101(c).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. Respondents, leaders of the Invisible Empire, Knights of the Ku Klux Klan (hereinafter KKK), brought this civil rights action in the United States District Court for the District of Connecticut under 42 U.S.C. § 1983 claiming that their First, Fourth, and Fourteenth Amendment rights were violated when the petitioners, state officials, obtained and implemented state court orders authorizing pat-down searches for weapons of all persons attending rallies they had sponsored. The district court, Cabranes, J., agreed that the searches violated the Fourth Amendment and enjoined the practice. Because it believed that the searches, though never condemned

by any court and approved by the state courts, violated clearly established constitutional law, the district court also awarded nominal damages to the respondents. App. at 29a. On petitioner's appeal, the Court of Appeals for the Second Circuit affirmed the district court's judgment that pat-down searches were, under the circumstances, unconstitutional. It did, however, modify the injunction so as to permit magnetometer screening at all future KKK rallies. The court of appeals also reversed the district court's award of nominal damages. App. at 64a-65a. This petition followed.

2. In September of 1980, the KKK held its first rally in Connecticut in about half a century in the small, rural community of Scotland.[1] Open to the "white public," Tr. at 839-40, the rally followed by about one year a clash between a KKK faction and opposing groups in Greensboro, North Carolina in which several people were killed. Prior to the rally, Connecticut State Police (hereinafter CSP) officials learned that news of the rally prompted various individuals and groups, including the International Committee Against Racism (hereinafter INCAR), to plan counter-demonstrations at the rally site. Some of these groups had a history of violent confrontations with the KKK and the police, and information provided by an undercover agent of the United States Treasury Department indicated that INCAR members would be armed (though not with firearms) and ready to attack Klansmen. In addition, the CSP learned that KKK members intended to arm themselves, for self-defense, and that their leader, Imperial Wizard Bill Wilkinson, planned to attend with armed bodyguards. Local residents heard gunfire from the site of the rally only days before it was to take place.

Believing that Klansmen would be armed, the Governor intended to forbid the rally altogether. At the suggestion of the Chief State's Attorney, however, the Governor agreed that state and local officials should seek a state court injunction,

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[1] Unless otherwise noted, facts appearing in this statement of the case derive from the opinion of the Second Circuit.

based on the intelligence they had gathered, that would ban the possession of firearms or other dangerous weapons on one's person or in a motor vehicle within the boundaries of the Town of Scotland absent specific authorization from Scotland authorities. Tr. at 1625-30, 1636. The injunction was sought and obtained *ex parte*. It was enforced by establishing several checkpoints on main roads leading into Scotland, within the town, and just outside the rally site. Persons and motorists seeking to pass through these checkpoints were informed that they would be subject to a pat-down search if they proceeded to the rally site.[2] The searches that were conducted were not based on individualized probable cause or reasonable suspicion, though persons subjected to search were first informed that they could avoid being searched by choosing not to enter the rally area. The searches yielded seven firearms, fifty-four rounds of ammunition, forty-one knives, two swords, two machetes, five baseball bats, three pieces of pipe, eight lengths of chain, two cans of mace, three sling shots, one set of weighted knuckles, a detonator, and a number of clubs. A firearm also was discovered under the speaker's podium. Tr. at 788.

Although violence did not occur within the rally site itself, members of Citizens Against Racism, during an attempt to march to the rally, attacked people in the area outside the site with their fists, rocks, sticks and flagpoles. At least eight persons were injured as a result of the attack, during which officers heard two gunshots ring out. Tr. at 856-57, 1074-75; Ex. 19.

The next KKK rally involved in this case occurred in March, 1981, six months later, in the City of Meriden. KKK members planned to march to and from the city hall. State and local officials did not seek a state court weapons injunction or authority to search on less than probable cause.

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[2] Unlike later state court orders, the Scotland order contained no express authorization to conduct searches.

> The demonstration was attended by fifty police officers, twenty-one Klansmen, 1,500 to 2,000 spectators and press, and a substantial number of anti-Klan demonstrators. As Klan members arrived at the City Hall steps, they were attacked with rocks and bottles thrown by anti-Klan forces. A person with a bullhorn advocated violence against the Klan and the police. Fist fights broke out among various groups in the crowd, and automobile windows were smashed. As the police attempted to escort the Klan out of the area, demonstrators pelted the Klan and the police with rocks, bottles, boards, clubs, and bricks. Two people used a building block to strike [respondent] Farrands' daughter on the back. At some point during the demonstration, Klansman Clyde Dick was restrained by the police when he attempted to draw a revolver from his coat pocket. Twenty policemen, six Klansmen, and one bystander received injuries. Many of the officers were hit with rocks or bricks. One female Klan member suffered head lacerations and injuries to the skull, while another was rendered semiconscious by a blow to the head.

App. at 43a–44a.

The Klan returned to Meriden four months later. Again, the State did not seek an order barring weapons or authorizing searches. Searches of Klansmen, with their consent, produced two pistols, several ax handles, sticks, and pocket knives, which were confiscated by police. Police also disarmed a group of anti-Klan demonstrators whom they had observed gathering or carrying rocks, sticks and clubs.

This demonstration ended before it began. INCAR members began to attack KKK members, who were escorted by police, with rocks, bottles, and tin cans; fist fights broke out within the crowd. Police halted the rally and cleared the area. Three officers and one Klansman had to be treated for injuries.

These events led state officials to explore new methods for preventing violence at future rallies while preserving the

speech and associational rights of those attending. Prior to the next rally, scheduled for October 10–11, 1981 in Windham, and the twelve rallies that followed, state officials sought state court injunctions barring the carrying of firearms or other dangerous weapons on and around rally sites and permitting pat-down searches of persons attending the rally. The ban on weapons in these orders typically extended only to the demonstration sites and the immediate vicinity. The orders generally followed the language used in the Windham order, which provided:

> All persons entering the designated area will be advised of the injunction and the option of leaving the area with their weapons. Those who choose to enter the designated area will be questioned concerning their possession of weapons and, where appropriate, a frisk for weapons will be performed. All lawfully possessed weapons held pursuant to the injunction will be tagged and returned to the lawful owners upon their exit from the designated area.

App. at 45a (italics omitted).

No order was sought or rendered without service of civil process and notice on local KKK officials and a full evidentiary hearing at which evidence of the likelihood of violence at the particular rally was presented. Ex. 144 at 6; Ex. 160 at 75. State court judges also were informed of the manner in which law enforcement officials proposed to enforce the injunctions, i.e., through pat-down frisks for weapons of all persons choosing to pass through checkpoints established around the rally sites.

No major disruptions occurred at KKK demonstrations for which the state court injunctions were issued.[3] All persons

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[3] A court order was sought, but not rendered, for one rally in the small town of Canterbury. No disruption of that rally occurred, though some thirty shotguns, rifles, and handguns were observed in the hands of Klansmen and others. Ex. 148 ¶ 6.

seeking to pass established checkpoints were advised of their right to turn back and avoid the weapons pat-down. Nevertheless, the kinds of weapons confiscated by the police, even with the benefit of court orders authorizing the weapons searches, can be seen from the list of weapons seized at one rally in Danbury:

> three clubs, fifteen shells, twenty-seven knives, seven axes, a pick, two pitchforks, eleven ax or hammer handles, twenty-three arrows, two hatchets, five sheaths, four tomahawks, six machetes, two shillelaghs, four rubber hose pieces, three tear gas containers, two pellet guns, a BB gun, two spears, a lead pipe, a chain with lead weights, an Indian head club, a metal pike, a blackjack, a crossbow, a whip, a flare-launcher, and a wooden stake.

App at 47a. In addition, a machine gun and approximately thirty rifles were seized from the owner of the property used for that rally.

3. Although the respondents never appeared with counsel to contest these orders in state court, they commenced this action in federal court under 42 U.S.C. § 1983 claiming that the pat-down searches conducted pursuant to the state court orders violated their rights under the First, Fourth and Fourteenth Amendments to the United States Constitution.

The district court, Cabranes, J., rejected the due process claim and held the First Amendment issue in abeyance, but agreed that the searches violated the respondents' Fourth Amendment rights.[4] The district court's conclusion was based in large part upon the testimony of an expert witness called

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[4] The district court found unpersuasive the respondents' due process claim because it believed that the state judges never authorized pat-down searches on less than reasonable suspicion. App. at 25a. The court of appeals would not credit this conclusion, however, based on the transcripts and pleadings in the state proceedings and the uncontradicted testimony in district court. App. at 46a, 63a; Tr. at 1184, 1186-89, 1547-48, 1588, 1595-96.

by the Klan leaders at trial, Robert W. Klotz. A retired deputy chief of police in the District of Columbia, Klotz expressed his opinion that the absence of violence at rallies where court authorized searches were conducted was the result of improved crowd control techniques, as well as other measures, and that the weapons searches "were not necessary or even particularly helpful in preventing violence." App. at 12a. The district court, thus, rejected the contrary opinion of seven CSP officials, who also were trained to handle mass demonstrations and violent crowds. *See* citations in petitioners' brief before the Second Circuit at 12.

In post-judgment motions, the petitioners sought a stay of the district court's order pending appeal or, in the alternative, a modification of the injunction so as to permit at least the use of magnetometer scanning at an upcoming KKK rally. The district court denied both motions, noting that the record itself established the ineffectiveness of magnetometers in detecting the types of weapons responsible for the injuries inflicted at prior rallies. App. at 34a.

4. The Court of Appeals for the Second Circuit reversed in part. That court agreed that pat-down searches under the circumstances violated Fourth Amendment rights, but concluded that magnetometer searches would not. In so doing, it found the district court's categorical opinion on the usefulness of the pat-down searches in preventing serious violence to be without basis in the record. App. at 54a–56a. The court of appeals failed to address, however, the district court's conclusion and the opinion of CSP officials that magnetometer scanning simply would not suffice to detect weapons of the type used in violent assaults during the demonstrations.

This petition followed.

REASONS FOR GRANTING THE WRIT

This case raises an important question of first impression with far-reaching significance. It concerns the legitimate authority of government to protect citizens from the substantial likelihood of harm that has arisen when they have sought to exercise their First Amendment rights in advancing or condemning controversial political, religious and racial views. To the extent that a real risk of violence at such gatherings would deter the exercise of First Amendment rights, a proposition few would doubt, the case concerns not only the authority of government, but its obligation in a democratic society to protect the free exchange of ideas and ideologies, no matter how repugnant, in an environment free from intimidation by violence.

1. This case has great national significance

It is evident to all that we live in an increasingly dangerous society. But the danger involved in this case is different in kind from that created by the predatory crime that afflicts our streets, schools and homes. The violence in this case is not motivated by greed or passion; nor is it the product of irrational aggression. It has, rather, one object: the suppression of ideas so as to advance political ends. This type of violence is especially threatening, for it challenges both the commitment and the ability of government in a free society to protect the marketplace of ideas.[5] No constitutional right,

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[5] The object of the state court orders sought in this case was expressed by counsel at one of the pre-rally hearings:

> We are in the anomalous position of safeguarding the First Amendment speech and associational rights of those who would deprive them of others. We make it clear for the record that[,] while we hold their beliefs in contempt, we do not hold the rights that they possess as citizens under the First Amendment in contempt and will do everything in our power to implement those

(continued)

and particularly the rights of association and free speech under the First Amendment, is self-executing. Without enforcement by the executive branch, constitutional guarantees would have little meaning.

The obligation of government to implement First Amendment rights in the context of this case is not unlike other governmental responsibilities. The duty to ensure public access to courts, to protect channels of communication, to preserve the means of safe travel, to safeguard the electoral process, and to maintain the security of military and diplomatic installations rests daily upon the federal government and the governments of the states.

The means of fulfilling these various obligations cannot remain static, just as the security measures used to protect the early presidents of this Nation have not remained unchanged. As the likelihood and extent of harm and sophistication of the means for inflicting it increase, the effectiveness of the governmental response to the threat created must likewise be enhanced.

Thus, we enter courthouses and other governmental buildings today expecting to pass through some sort of security system designed to detect weapons that could be carried within. Pocketbooks, bags, briefcases are examined, where only several decades ago such precautions would be viewed as at least excessive and over-cautious. But recent violence in courtrooms and other government buildings has disproved that notion. *See McMorris v. Alioto*, 567 F.2d 897, 899-900 (9th Cir. 1978).

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[5] *(continued)*

rights. In fact, we view the security precautions that have been undertaken for the expected rally on Saturday to be in a sense an implementation of the First Amendment rights and not in any way an attempt to undermine them.

Ex. 160 at 78.

Similar measures are employed with respect to air travel, public appearances of high government officials or candidates for high office, military installations, diplomatic facilities, and legislative chambers. We have seen too much ideologically-related violence in our time to ignore the threat it poses. Naiveté would be too costly.[6]

This case questions the reasonableness of security measures employed at public gatherings where people advocate political beliefs that generate emotionally explosive responses. But the question presented could as easily relate to security precautions taken at a presidential appearance, at a diplomatic facility, or at a state capitol or courthouse. The security of any governmental or public forum that is specifically threatened with violence is implicated in this case, not just a KKK rally site in Connecticut.

Nor is the significance of the security issue raised here minimized by the Second Circuit's approval of magnetometers in this context. What that court failed to appreciate is that, as the district court expressly found, virtually all of the injuries at these gatherings were inflicted, not by firearms detectable with a magnetometer, but by other instruments, many of which could not be so detected. Magnetometers, which detect only items containing metal, provide no security against clubs, bottles, rubber hoses and rocks. *See United States v. Lopez,* 328 F.Supp. 1077, 1085 (E.D.N.Y. 1971). Other, more sophisticated weapons and certain explosives also will elude magnetometer screening. Liquid bottle bombs, fiberglass knives, plastic grenades and other plastic explosives can be made or obtained by violent political groups. *See United States v. Albarado,* 495 F.2d 799, 804 (2d Cir. 1974). These items evade magnetometer detection because they have no,

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[6] Even with enhanced security precautions, statistics continue to reflect the success ideologically-motivated criminals have. *See Public Report of The Vice President's Task Force on Combatting Terrorism* (1986); Bassiouni, *Terrorism, Law Enforcement, and the Mass Media: Perspectives, Problems, Proposals,* 72 J. Crim.L. & Criminology, 1, 4-5 (1981).

or only slight, metallic content; they can evade visual inspection by being concealed beneath loose-fitting clothing. In short, the variety of dangerous weapons that can elude magnetometer screening is limited only by the ingenuity of the terrorist or violent agitator.

It is, thus, clear that resolution of the Fourth Amendment question raised by Connecticut officials in this case would aid state and federal law enforcement agencies significantly in their efforts to protect the institutions of government and the exercise of individual liberties.

2. This Court should resolve the unsettled question of federal law presented

This case raises an important but unsettled question of federal law. Twelve state court judges considered the injunctions and implementing searches to be warranted and lawful under the circumstances. The federal courts, to different extents, disagreed. The district court was of the view that the state has less of an interest in preserving public safety at political rallies than at federal courts or airports.[7] App. at 20a.

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[7] As noted above, the district court also expressed its opinion that the "searches of persons and automobiles are not necessary or even particularly helpful in preventing violence at Klan rallies in Connecticut." App. at 12a. The court of appeals pointed out that the expert's opinion, upon which the district court relied, could not support any such categorical "finding," and hence, rejected it. App. at 54a-56a.

More important than whether some expert would have lent support to the district judge's conclusion, however, is the principle that police conduct is not unconstitutional simply because its objective might have been accomplished through less intrusive means. *See Colorado v. Bertine*, 479 U.S. ____, 107 S.Ct. 738, 742 (1987); *United States v. Sharpe*, 470 U.S. 675, 687 (1985); *Illinois v. Lafayette*, 462 U.S. 640, 647-48 (1983). The inquiry, rather, is whether police acted unreasonably in adopting the means they used. *Colorado v. Bertine*, 107 S.Ct. at 742. "Monday morning quarterbacking" is as popular in assessing police conduct as it is in other areas of professional activity. But the Fourth Amendment does not call for a battle of

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The court of appeals rejected that notion and recognized the need for some, albeit limited, protection against the introduction of weapons at political rallies. State officials maintain, however, that it is demonstrably reasonable to prevent the carrying of any weapon into a public forum for the exchange of ideas when there is good reason to believe that people intend to participate with more than their voices.

Understandably cautious, the lower courts were at a loss to find any authority that would provide specific support for the searches conducted. But the first magnetometer search at an airport or governmental building brought with it no legal authority directly on point; such searches were not therefore unconstitutional.[8] *See, e.g., United States v. Albarado*, 495 F.2d at 803-4. That the government in our society may respond effectively to new and different threats of violence reveals the genius in the standard governing police conduct created by the Framers of the Fourth Amendment. That standard is a test of reasonableness that is as appropriate in the 20th century as it was in the 18th. Today's technology, available both to detect and to perpetrate crime, and the current tactics of political extremists cannot be ignored simply because they were not contemplated in the 18th century.

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[7] *(continued)*
the experts on the question of the need for security procedures. Especially is that so when the competing expert has no connection with state government and, thus, has no obligation to protect the safety of its citizens. Our federal system has not required that the judgment of state officials, who are answerable to the citizens of the state, be so lightly tossed aside.

In the absence of a showing of incompetence or subterfuge, the judgment of state officials that a policy is necessary to preserve public safety should be given deference. *Cf. Turner v. Safley*, 482 U.S. ____, 107 S.Ct. 2254, 2260-62 (1987) *and Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979) (prison safety).

[8] Indeed, the court of appeals acknowledged the uniqueness of the issue when it prefaced its finding that the searches were unconstitutional with the qualifying phrase, "taking into account the existing law." App. at 59a.

This Court has said that the test of reasonableness "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails," and that consideration should be given to "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). The district court and, to a lesser degree, the court of appeals misapplied this test. The district court failed to see the compelling need to exclude weapons from what state officials had good reason to believe would be a violent confrontation of armed, ideologically opposed groups. By focusing on alternative methods of preventing violence, such as increased police manpower, both courts did not appreciate that nearly all administrative, protective searches can be avoided by the use of increased police personnel. The fact that for one rally alone police costs, even with the benefit of the pat-down searches, amounted to $75,000.00 apparently did not influence the lower courts' assessment of reasonableness. Tr. at 1705. While the court of appeals recognized the need to exclude weapons from rally sites, it did not go on to ascertain whether magnetometers would satisfy it, and clearly they would not.

Neither court fully appreciated other features of the searches. All of the rally site searches were judicially authorized, not the product of unbridled police discretion.[9] They were conducted on everyone, and so avoided particular stigma to anyone. *Cf. United States v. Albarado*, 495 F.2d at 806 (magnetometer scanning). The orders authorizing the pat-downs were based on specific evidence, which pertained to the particular rally and established that members of ideologically

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[9] Indeed, the Second Circuit acknowledged that the state court orders "satisfied many of the concerns to which the traditional warrant requirement of the fourth amendment is directed." App. at 63a. It went on to suggest that Connecticut officials in the future seek "area search warrants," such as Justice Powell and at least five other justices of this Court identified with approval in *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 n.3, (1973), *id.*, 283-85 (Powell, J., concurring), *id.*, 288 (White, J., dissenting). The Second Circuit failed to explain, however, why the orders obtained did not in fact already satisfy the *Almeida-Sanchez* standard.

opposed groups would attend with arms intending to use them.[10] The pat-down searches were conducted, not to investigate crime, but for the public safety purpose of preventing physical injury or death to the participants and, so, to protect their First Amendment rights of association and free expression. *See Colorado v. Bertine*, 107 S.Ct. at 742 (probable cause standard is "peculiarly related to criminal investigations, not routine noncriminal procedures); *Griffin v. Wisconsin*, 483 U.S. ____, 107 S.Ct. 3164, 3167-8 (1987) (regulatory searches not subject to probable cause standard). Finally, the searches were voluntary, and so lacked the type of police control and intimidation that pat-downs in the criminal context involve. A citizen who can thumb his nose to a police search is in a far different position from one who is forced to spread eagle on the side of a road or building. *See generally* 4 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* § 10.7 (2d ed. 1987).

The reasonableness of these searches, under the particular circumstances of this case, becomes evident. Even if it does not, however, what does is the need for clarification of the law. The lower courts could not agree on a resolution of the matter. Existing law is concededly unclear. But the obligation of government to protect public safety and facilitate the exercise of constitutional rights in a dangerous world arises daily. Failure to give government officials guidance in this uncharted area of Fourth Amendment law may exact a price, whether in public safety or in individual liberties, that none of us should be asked to pay.

The issue merits review.

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[10] As this Court has said in a related context, "[t]his Court respects, as it must, the interest of the community in maintaining peace and order on its streets." *Feiner v. People of State of New York*, 340 U.S. 315, 320 (1951) (state has power to prevent clear and present danger of riot or other immediate threat to public safety).

CONCLUSION

For the reasons set out above, the petition should be granted.

Respectfully submitted.

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